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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73-672

WILLIAM J. SMITH, *Petitioner,*

VS.

STATE OF CALIFORNIA, et al., *Respondents.*

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

On May 3, 1971, the United States District Court for the Northern District of California issued an order dismissing petitioner's complaint brought under various provisions of the Civil Rights Act (No. C-69-90 AJZ). The dismissal is reflected in a minute order of that date.[1]

[1]The "Order Dismissing Action" which appears as Appendix I to the petition has been erroneously proffered as the order of the District Court. Our examination of the District Court records discloses that no such order was ever signed or filed. The purported order is actually the proposed order which was submitted to the District Court in conjunction with the Motion to Dismiss pursuant to Rule 114(d) of the Local Rules of Practice for the United States District Court for the Northern District of California. Only a minute entry for May 3, 1971, noting that the motion to dismiss was granted, reflects the final action of the District Court.

The opinion of the Court of Appeals for the Ninth Circuit, which was filed on July 23, 1973, has not yet been published. A copy of that opinion appears as Appendix II to the petition herein.

JURISDICTION

The jurisdiction of this Court is sought under title 28, United States Code, section 1254(1).

QUESTIONS PRESENTED

1. Can a State be sued for monetary damages under provisions of the Civil Rights Act of 1871?

2. Has the State of California consented to be sued in federal courts under provisions of the Civil Rights Act of 1871?

3. Can a State be sued for monetary damages under title 28, United States Code, section 1331(a) for an alleged violation of federal constitutional rights?

STATUTES INVOLVED

The following federal and state statutes are involved: title 28, United States Code, section 1331(a); title 42, United States Code, section 1983; and California Government Code sections 815.2(b), 820.2, and 845.8(a).

STATEMENT OF THE CASE

On October 14, 1969, petitioner filed a complaint in the United States District Court for the Northern District of California under various federal statutes including title 28, United States Code, section 1331, and title 42, United States Code, section 1983 (Civil Rights Act of 1871). Defendants included the State, various State agencies, and a number of "Does."[2] Those defendants which had been served filed a motion to dismiss on April 27, 1970.[3] On March 17, 1971, petitioner filed a motion for entry of default against the State and Abelico Chavez. On May 3, 1971, a hearing was held upon petitioner's motion for entry of default and defendants' motion to dismiss; the former being denied and the latter granted. An appeal was taken and on July 23, 1973, the Court of Appeals for the Ninth Circuit affirmed the decision of the District Court.

STATEMENT OF FACTS

Introduction

According to the complaint filed in the District Court, petitioner was serving several sentences in a State prison when, on April 25, 1961, the California Adult Authority fixed his sentence at 7 and ½ years,

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[2]Defendants listed included the State of California, the California Adult Authority, the California Department of Corrections, the County of Doe, and Does I-XX.

[3]The two State agencies were served on March 16, 1970, and the State itself was served the following day. According to petitioner, one Abelico Chavez was served as "Doe Three" on June 17, 1970. The records of the District Court do not contain any return of service on Mr. Chavez.

with 4 and ½ years to be served on parole. Under this determination, petitioner was scheduled to be released on parole on February 20, 1962. But on February 26, 1962, the Adult Authority rescinded its prior action and petitioner continued to remain confined in state prison until November 19, 1968. In October of 1968, petitioner filed a writ of habeas corpus in the Kern County Superior Court for the purpose of challenging his continued confinement, and on February 14, 1969, that court discharged petitioner from further confinement, finding that the Adult Authority's rescission of parole had been "arbitrary, capricious, and without just cause."

In the petition for writ of certiorari, petitioner has been even less candid with this Court in framing his "statement of case." Thus he has charged that State officials "failed to release petitioner . . . from confinement, in violation of California Penal Code §§ 2940, 3063," (p. 7) Petitioner has not explained, to the District Court or to this Court, the entire framework in which this case arises. Mindful of this Court's admonition in *Conway v. Adult Authority,* 396 U.S. 107, 110 (1969), and realizing therefrom that this Court does not desire significant constitutional questions to be decided in a vacuum, respondents offer the following factual background.

Underlying Facts

On February 18, 1959, petitioner was sentenced to State prison after having been found guilty of conspiring to commit burglary and second-degree bur-

glary, with a prior conviction of first-degree burglary.[4] On March 17, 1959, petitioner was also found guilty of second-degree burglary in a separate proceeding; the sentence imposed to be served concurrently with the February conviction.[5] The maximum term of imprisonment under these convictions was 1-15 years. Calif. Pen. Code § 461.

On April 25, 1961, the California Adult Authority fixed each of petitioner's terms of imprisonment at 7 and ½ years, with the last 4 and ½ to be spent on parole. On December 6, 1961, the Associate Superintendent of the institution at which petitioner was confined informed the Adult Authority that petitioner feared for his life if he were paroled within California[6] and recommended consideration of an out-of-state parole, though noting that petitioner had no contacts outside the State.[7] On December 15, 1961,

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[4]San Joaquin County Super. Ct. No. 13919.

[5]Los Angeles County Super. Ct. No. 201634.

[6]According to a letter which petitioner wrote to the Director of the Christian Service Center in Youngstown, Ohio, on January 29, 1963, the basis for this fear was that:

> "I was one of two informers for narcotics agents in California. As a result of my testimony, several key underworld figures were sentenced to long prison terms. The other informer was killed and I am certain I also will be killed as soon as I leave prison if I remain in California."

[7]In this letter, dated December 6, 1961, Associate Superintendent Lloyd observed:

> "I again talked to Smith . . . regarding his apprehension of living in California. As his parole date gets nearer, his fear of going out in California seems to become more evident. He feels very strongly that he will be killed within a short time if he remains in this State outside of prison. He desires to get into another State, preferably some distance from California. . . . He is California born and has no connections outside of the State of California."

upon receipt of the report concerning petitioner's fears, the Adult Authority placed petitioner's case on its March 1962 calendar for review. On February 1, 1962, a Classification and Parole Representative informed the Adult Authority that "It is the feeling of Institution Staff, who are aware of Smith's situation, that his chances to complete a successful parole in California are not good, due to external forces beyond his control."[8] On the basis of this negative recommendation and the absence of any out-of-state parole program, the Adult Authority rescinded its prior grant of parole on February 26, 1962.

Petitioner was granted a parole effective March 4, 1968, when suitable out-of-state arrangements had been made. However, petitioner was not physically released on parole until November 19, 1968, when such arrangements were completed.

Prior Habeas Corpus Litigation

Petitioner extensively litigated the propriety of the Adult Authority's action in rescinding his parole. He

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[8]Petitioner, too, had doubts about his ability to "make it" if he were paroled in California. In a letter dated May 29, 1963, to Mr. John W. Brewer of the Adult Authority, petitioner said:

> "Mr. Brewer there are more people than just Henry [illegible], that have concerned themselfs with my demise, he was not the only one I testified in court against there were others that I was the cause of there arrest and conviction, and still others, that were unaware of my actions and the part I played until they was brought before the federal grand jury then they realized that I was the causer. They now look upon me with acrimony and violence. They are on the streets now! This is my life! my only life! please don't let them spill my blood. Don't force me into a parole in the State of California. For how could I complete a parole in a state of trepidation? God knows that I do not want to come back to your prison."

filed a petition for a writ of habeas corpus in the Kern County Superior Court on April 2, 1965, but it was denied on April 15 (No. 726). He filed a similar petition in the California Court of Appeal for the Fifth Appellate District on July 2, 1965, but that was denied the same day (5 Crim. 192). He then filed a petition in the California Supreme Court on July 21, 1965, which was denied on August 18 (Crim. No. 9208).

Petitioner also sought relief in the federal courts. On May 17, 1965, he filed a petition for a writ of habeas corpus in the United States District Court for the Central District of California,[9] but it was denied on June 7, 1965 *(Smith v. Lloyd,* No. 65-729-Y). He filed another petition on September 27, 1965, which was also denied on October 5, 1965 *(Smith v. Lloyd,* No. 65-1416-Y). In denying the application, the District Court observed that: "The petition shows that parole was rescinded because of the refusal to serve it within the State. Parole is a matter of grace and it is not the province of the person affected to dictate the condition under which it will be granted."

Underlying State Litigation

On April 17, 1968, petitioner filed a complaint for declaratory relief in the Kern County Superior Court (No. 102331), but when the matter was heard and the court discovered that petitioner really sought release

[9]At the time these cases were filed, the District Court was denominated the United States District Court for the Southern District of California, Central Division. As the result of a reorganization of the district courts in California, this same court is now the United States District Court for the Central District of California.

from custody, the declaratory-judgment action was suspended pending an application for habeas corpus relief. On October 21, 1968, petitioner filed an application for habeas corpus relief with the Kern County Superior Court (No. 884). In this petition, it was alleged that continued detention was unlawful because: (a) the Adult Authority improperly concluded that petitioner had "rejected" the conditions of parole, since petitioner had done nothing more than raise questions about the wisdom of a parole in California, and (b) petitioner had not been informed that if he refused to be paroled in California, his parole date could be rescinded. An evidentiary hearing was held and on February 25, 1969, the petition was granted and petitioner ordered discharged. The action of the Kern County Superior Court was based upon the following findings of fact and conclusions of law:

> "3. On April 25, 1961, the Adult Authority set petitioner's term on the above convictions at seven and one half (7½) years with four and one half (4½) years to be served on parole.
>
> "4. On February 26, 1962, the Adult Authority rescinded its action of April 25, 1961.
>
> "5. Said action of February 26, 1962, departed from the Adult Authority's usual custom and practice of waiting 90 days from and after parole and before referring the matter to the full board and was taken for no reason other than petitioner's expressed reluctance to spend his parole in California and in spite of the fact that petitioner had already worked out a tentative plan for residence in another state.

"6. At no time was any condition of parole regarding place of residence imposed by the Adult Authority or rejected by petitioner. The action of the Adult Authority of February 26, 1962 was arbitrary, capricious and without just cause.

CONCLUSIONS OF LAW

"(a) Petitioner's sentence, as established by the Adult Authority, may not be rescinded by said Authority without just cause.

"(b) The action of the Adult Authority in the instant case was arbitrary, capricious and without just cause.

"(c) Petitioner is entitled to be discharged."

Petitioner was discharged upon receipt of this order.

ARGUMENT

I

THE CIVIL RIGHTS ACT WAS NOT INTENDED TO RENDER STATES LIABLE IN MONETARY DAMAGES FOR THE CONDUCT OF THEIR EMPLOYEES.

Petitioner suggests that this Court grant certiorari to authoritatively resolve the question of State liability under the Civil Rights Act of 1871; an issue upon which there is no decision of this Court directly in point. "It is petitioner's contention that this unanswered question is too vital to the protection of individuals' Constitutional rights to be left to the variances of lower Court opinions." (Petition, p. 11, footnote omitted) Were there indeed any "variances of

lower Court opinions," respondent too would urge this Court to hear this case. But a grant of certiorari herein would be a needless squandering of this Court's limited resources, for the lower federal courts are unanimous in holding that a State is not liable in monetary damages for suits brought against State employees under provisions of the Civil Rights Act. *Neal v. Georgia,* 469 F.2d 446, 448 (5th Cir. 1972); *Meyer v. New Jersey,* 460 F.2d 1252, 1253 (3d Cir. 1972); *United States ex rel. Foreman v. New Jersey,* 449 F.2d 1298 (3d Cir. 1971); *Collins v. Moore,* 441 F.2d 550, 551-52 (5th Cir. 1971); *Gambocz v. Sub-Committee on Claims,* 423 F.2d 674, 675 (3d Cir. 1970); *Fear v. Pennsylvania,* 413 F.2d 88, 89 (3d Cir.), cert. denied, 396 U.S. 935 (1969); *United States ex rel. Gittlemacker v. County of Philadelphia,* 413 F.2d 84, 86 (3d Cir.), cert. denied, 396 U.S. 1046 (1969); *Whitner v. Davis,* 410 F.2d 24, 29 (9th Cir. 1969); *Stewart v. Minnick,* 409 F.2d 826 (9th Cir. 1969); *Deane Hill Country Club, Inc. v. City of Knoxville,* 379 F.2d 321, 324 (6th Cir. 1967); *Loux v. Rhay,* 375 F.2d 55, 58 (9th Cir. 1967); *Clark v. Washington,* 366 F.2d 678, 680-81 (9th Cir. 1966); *Williford v. California,* 352 F.2d 474, 476 (9th Cir. 1965); *United States ex rel. Lee v. Illinois,* 343 F.2d 120 (7th Cir. 1965).

The Court of Appeal based its decision upon the opinion of this Court in *Monroe v. Pape,* 365 U.S. 167, 187-91 (1961), wherein this Court examined the genesis of the Civil Rights Act of 1871 and concluded that Congress intended liability to extend only to

natural persons and not to municipalities. Such reliance upon *Monroe* is sound. If the Act was not intended to apply to municipalities, it would hardly be reasonable to suggest that the statute was intended to apply to the States, despite the fact that the municipalities of which State is composed are themselves immune from suit. *Williford v. California,* 352 F.2d 474, 476 (9th Cir. 1965). Thus the lower federal courts are unanimous in the view that a State is not a "person" within the purview of the Civil Rights Act. *United States ex rel. Foreman v. New Jersey,* 449 F.2d 1298 (3d Cir. 1971); *Fear v. Pennsylvania,* 413 F.2d 88, 89 (3d Cir.), cert. denied, 396 U.S. 935 (1969); *Whitner v. Davis,* 410 F.2d 24, 29 (9th Cir. 1969); *Deane Hill Country Club, Inc. v. City of Knoxville,* 379 F.2d 321, 324 (6th Cir. 1967); *Williford, supra; United States ex rel. Lee v. Illinois,* 343 F.2d 120 (7th Cir. 1965).

Citing *District of Columbia v. Carter,* 409 U.S. 418 (1973), petitioner claims that this Court has limited *Monroe* to municipalities, and has in *Carter* indicated that the Civil Rights Act was intended to apply to the States (Petition, pp. 14-15). *Carter,* however, is inapposite and does not stand for the proposition that States are liable for monetary damages; the decision actually discussing States only insofar as the Act imposes liability upon persons acting under the color of law of any "State or Territory." This Court has in fact only recently reaffirmed *Monroe v. Pape* insofar as it has pointed out that liability under the Act extended only to "persons." See *City of Kenosha v.*

Bruno, 412 U.S. 507, 512-13 (1973); *Moor v. County of Alameda,* 411 U.S. 693, 706 (1973).

II

CALIFORNIA HAS NOT AND CAN NOT CONSENT TO SUITS IN FEDERAL COURTS UNDER THE CIVIL RIGHTS ACT

Petitioner asserts that California is amenable to federal Civil Rights Suits because, under various provisions of State law, California has consented to suits for damages. There are three distinct reasons why petitioner's contention is without merit.

(1) Under the Eleventh Amendment, a State cannot be sued by its own citizens without its consent. *Hans v. Louisiana,* 134 U.S. 1, 10-21 (1890). Under the California Tort Claims Act, the State has consented to suits under limited circumstances *in state courts.* California has not consented to being sued in federal courts under provisions of the federal Civil Rights Act. See *Whitner v. Davis,* 410 F.2d 24, 29 (9th Cir. 1966); *Clark v. Washington,* 366 F.2d 678, 680 (9th Cir. 1966); see also *Gambocz v. Sub-Committee on Claims,* 423 F.2d 674, 675 (3d Cir. 1970).

(2) Even under California law, the State is immune from suits for damages arising out of "any injury resulting from determining whether to parole or release a prisoner or from determining the terms and conditions of his parole or release or from determining whether to revoke his parole or release." Calif.

Gov. Code § 845.8(a). Whatever California has consented to, it has not consented to suits such as petitioner's which arise out of an alleged erroneous rescission of parole.

(3) A State may consent to be sued. *Parden v. Terminal R. Co.,* 377 U.S. 184, 186 (1964). However, parties cannot by "consent" create jurisdiction in a federal court which had no jurisdiction in the first place. *Mills v. Brown,* 42 U.S. (16 Pet.) 337, 339 (1842). Thus the parties cannot "consent" to federal jurisdiction which purports to rest upon provisions of the Civil Rights Act when that Act does not extend liability under those circumstances. See *City of Kenosha v. Bruno,* 412 U.S. 507, 511-12 (1973). Since the Civil Rights Act was not intended to apply to States in the first place (see Argument I, *supra),* California cannot "consent" to being sued under any of its provisions.

III

A STATE CANNOT BE SUED FOR MONETARY DAMAGES UNDER TITLE 28, UNITED STATES CODE, SECTION 1331

Relying upon *Bivens v. Six Unknown Fed. Narcotics Agents,* 403 U.S. 388 (1971), petitioner asserts that the State of California can be sued for "violations" of federal constitutional rights under title 28, United States Code, section 1331; a remedy wholly independent of the Civil Rights Act (Petition, pp. 10, 20-23). But as the Court of Appeal correctly observed, *Bivens* "is wholly concerned with questions of federal

claims against individuals—not sovereign immunity." *Bivens* does not purport to abrogate the Eleventh Amendment which renders States immune from suits without their consent, even if suit is allegedly based upon federal constitutional rights, *Parden v. Terminal R. Co.*, 377 U.S. 184, 186 (1964).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Dated, January 11, 1974.

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